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FILED

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In the
Supreme Court of the United States

OCTOBER TERM, 1995

RANGER INSURANCE COMPANY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the procedure used by the State of Louisiana to forfeit the bail bond in these proceedings violated the due process rights of the surety on the bail bond under the 14th Amendment to the United States Constitution.

LIST OF ALL PARTIES

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RANGER INSURANCE COMPANY is a Delaware corporation with its principal office in Houston Texas. It is a wholly owned subsidiary of Fairfax Financial Holdings, Limited, of Canada.

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STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Louisiana as rendered on May 31, 1996. Title 28, United States Code, Section 1257(3) confers jurisdiction on this Court to review the judgment in question by a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On September 18, 1991, Jaime L. Gonzalez was arrested in Calcasieu Parish, State of Louisiana, and charged with speeding and possession of more than four hundred (400) grams of cocaine in violation of La.R.S. 40:967(C)&(F). Gonzalez's bond was set at $200,000.00.

Ten days later, on September 28, 1991, Gonzalez as principal and petitioner, RANGER INSURANCE COMPANY (hereinafter referred to as "RANGER"), as surety, placed a bail bond into the criminal proceedings. The bail bond was sufficient to obtain the release of Gonzalez from custody.

Sometime thereafter, the matter was transferred from the State of Louisiana to the federal authorities. Gonzalez was indicted in the United States District Court for the Western District of Louisiana in U.S.D.C. No. 92-20021 on June 17, 1992. The indictment against Gonzalez was later dismissed on July 16, 1992.

On June 2, 1994, nearly three years after his arrest, the Grand Jury for the Parish of Calcasieu indicted Gonzalez. On August 15, 1994, the state moved to schedule Gonzalez's arraignment for August 29, 1994. The district court's record in this matter contains a copy of a "Notice of Arraignment" addressed to Gonzalez. The notice indicates that a copy should be sent to the agent for RANGER. An unknown hand placed the notation "8/16" upon the copy of the notice.

Jaime Gonzalez did not appear for arraignment on

August 29, 1994. The matter was passed on the motion of the state. The state again moved to pass the matter on September 2, 1994. On September 7, 1994, the state moved to forfeit the bail bond. Upon the hearing of evidence, the trial court ordered the bond forfeited. A written judgment of bond forfeiture was signed in chambers on September 8, 1994.

The state in this matter did not issue notice to the surety, RANGER, or any agent of the surety, for the September 2, 1994, or September 7, 1994, court dates. RANGER received no notice that a hearing to forfeit the $200,000.00 bail bond that it placed into the criminal proceedings was scheduled by the state for September 7, 1994. No representative of the surety was present at the hearing on that date.

RANGER filed a "Petition for Nullity of Judgment, Motion for Discharge and Release of Surety" with the Fourteenth Judicial District Court for the Parish of Calcasieu on March 6, 1995. RANGER alleged therein that the judgment of bond forfeiture was a nullity because the prosecution was not timely instituted citing La.C.Cr.P. art. 701. The surety further alleged that the state failed to give RANGER the constitutionally and statutorily required notice of the bond forfeiture hearing.

On April 19, 1995, the trial court summarily denied the petition and motion filed by the petitioner herein. As to the failure of the state to notify the surety of the bond forfeiture hearing, the court stated:

> "...I'm just not intellectually or philosophically, or any other way inclined to think that just because

> the forfeiture did not occur for several days that that lets your company off the hook. I'm just not. You're not going to get that relief from me." (Record page 84, line 21.)

RANGER perfected a suspensive appeal to the Court of Appeal, Third Circuit for the State of Louisiana. RANGER presented and briefed two issues for review to the Court of Appeal. The second issue presented to the Court of Appeal was: "Does the procedure used by the state for forfeiting the bail bond in these proceedings violate the due process rights of the appellant, surety herein?" (Appeal Brief of RANGER INSURANCE COMPANY at page 5.)

On March 27, 1996, the Court of Appeal, Third Circuit, rendered an opinion upholding the action of the trial court. The Court of appeal stated:

> "Ranger also argues the forfeiture procedures utilized by the State did not meet the minimum due process requirements of Article I, Section 2 of the Louisiana Constitution of 1974 and the 14th Amendment to the United States Constitution." (Opinion of Court of Appeal, page 3.)

The Court of Appeal, citing two of its previous decisions, ruled that RANGER'S due process rights were not violated because, "... the surety was not prejudiced when the state chose to delay the bond forfeiture hearing for several days." (Opinion of Court of Appeal, page 4.)

Petitioner again raised the issue of the violation of its due process rights in its writ application to the Supreme

Court of Louisiana. (Application for Writ of Certiorari of RANGER INSURANCE COMPANY, page 4.) On May 31, 1996, the Supreme Court of Louisiana denied petitioner's application for a writ of certiorari.

ARGUMENT

The Due Process clause contained in the Fourteenth Amendment to the United States Constitution mandates that the parties whose rights are to be affected must be afforded the opportunity to be heard. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). This right to be heard has little reality or worth unless the interested party is informed that the matter is pending and can choose for itself whether to appear or default, acquiesce or contest. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950).

In order to enjoy the right to be heard, a party whose property the State is seeking to seize or forfeit must receive notice. The right to prior notice and a hearing is central to due process. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). Failure to give notice violates "the most rudimentary demands of due process of law." *Peralta v. Heights Medical Center, Inc.,* 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965)). The notice must be extended at a meaningful time and in a meaningful manner. *Fuentes v. Shevin,* 92 S.Ct. at 1994).

So that a party's right to notice and a hearing is given its full force and effect, such notice and opportunity to be

heard must be extended before the State deprives the party of its property interest. *Fuentes,* 92 S.Ct. at 1994, 1995. A deprivation of a property interest that may later be set aside is still a "deprivation" under the Fourteenth Amendment. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). No later hearing can undo the fact that an arbitrary taking violative of procedural due process has occurred. *Fuentes,* 92 S.Ct. at 1995.

Certainly, the forfeiture of a $200,000.00 bail bond undertaking is a deprivation within the meaning of the Fourteenth Amendment. This Court has not seen fit to distinguish between kinds of property in applying the Due Process Clause. *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 608, 95 S.Ct. 719, 723, 42 L.Ed.2d 751 (1975). Further, forfeitures are not favored and should only be enforced when fully within both the letter and spirit of the law. *United States v. One 1936 Model Ford V-8, Etc.,* 307 U.S. 219, 226, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1939). See also *Kirk v. United States,* 204 U.S. 688, 27 S.Ct. 788, 51 L.Ed. 671 (1907), affirming *Kirk v. United States,* 137 F. 753 (70 C.C.A. 187) (1905). In *Kirk* the Court of Appeal restrained the marshall from seizing property pursuant to a judgment of bail bond forfeiture, stating:

> "In this country, and indeed, in every civilized state, no man can be deprived of his property without due notice and opportunity to be heard and, after giving much consideration to the facts and law presented by this record, we are constrained to think that neither of these privileges has been accorded this complainant." *Kirk,* at 137 F. 753, 755.

The Due Process Clause guarantees the protection of fair procedure. *Zinermon v. Burch,* 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990). The state has a duty to follow a fair process of decisionmaking when it acts to deprive a party of its property. *Fuentes,* , 92 S.Ct. at 1994.

> "It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights...[And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Fuentes,* 92 S.Ct. at 1994, (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)).

Where the government has a pecuniary interest, the fairness of its decisionmaking is ensured by the requirement of an adversarial hearing. *James Daniel Good Real Property,* 114 S.Ct. at 502. In this matter, the District Attorney's Office for Calcasieu Parish stands to gain thirty percent (30%) of the bond amount plus interest (an amount greater than $60,000), and the Fourteenth Judicial District Court for the Parish of Calcasieu will collect twenty-five percent (25%) of the bond plus interest (an amount greater than $50,000.00). La. R.S. 15:571.11 (L)(1)(a)(i) and (ii).

On September 7, 1994, the State of Louisiana conducted a one-sided hearing to forfeit the sizable bail bond that had been placed in the underlying criminal proceedings. The property rights of petitioner, RANGER INSURANCE COMPANY, related to said bail bond were at stake at this hearing. RANGER received no notice that the State was going

to conduct a hearing on that date. The State had also failed to notify petitioner of the previously scheduled court date of September 2, 1994. No representative of petitioner was present on September 7, 1994, when the trial court ordered the forfeiture of the bail bond.

The State of Louisiana did not meet the minimum requirements of due process in this matter. The State conducted a secret one-sided determination of the property rights of petitioner without issuing any notice for the party to be affected to appear. RANGER was given no opportunity to contest the motion for bond forfeiture before a final judgment was signed, in chambers, by the court.

It may have been that the trial court would have forfeited this bond over the objection of RANGER. However, the relative merits of any defense to a deprivation of property does not obviate the constitutional mandate of notice and the opportunity to be heard. See *Peralta*, 108 S.Ct. at 899. In this matter RANGER did, in fact, have a meritorious defense to the forfeiture action. La.C.Cr.P. art. 701 releases the surety from a bond obligation where the State does not timely institute criminal proceedings. The courts below ruled that this defense was procedurally barred after the entry of the judgment of bond forfeiture. The holding of the Court of Appeal indicates that RANGER had to present this defense at the bond forfeiture hearing, a hearing for which RANGER received no notice.

Issuing notice to RANGER of the date and time of the bond forfeiture hearing imposes a relatively modest administrative burden upon the state. The state may not forgo this burden merely because RANGER is a corporation

engaged in the business of bail. *Cf. Mennonite Board of Missions v. Adams,* 462 U.S. 799, 103 S.Ct. 2706, 77 L.Ed.2d 195 (1983). The state herein can demonstrate no exceptional circumstances that would allow it to ignore the constitutional mandate of notice to the surety prior to forfeiture.

The Court of Appeal held that because RANGER had received notice requiring the appearance of Jaime L. Gonzalez on August 29, 1994, and because RANGER knew that a consequence of Gonzalez's non-appearance might be the forfeiture of the bond, that no further notice was due. *See generally* La.C.Cr.P. art. 344 and La.R.S. 15:85 (notice requirements and procedure for bail bond forfeiture). When Margarita Fuentes signed a contract with the Firestone Tire and Rubber Company she knew that Firestone was entitled to retake possession of the goods that she was purchasing if she failed to make payments under the contract. *Fuentes,* 92 S.Ct. at 1989. This Court held that Fuentes was entitled to notice prior to the repossession of said goods in spite of such knowledge. RANGER is afforded no less due process of notice and the opportunity to be heard under the Fourteenth Amendment. Knowledge of the possible consequences of certain events does not relieve the state of its duty to provide constitutionally mandated notice of the taking of property.

The State of Louisiana failed to give notice and the opportunity to be heard to petitioner, RANGER INSURANCE COMPANY, prior to forfeiting the bail bond placed into the criminal proceedings by RANGER. The district attorney's office and the court had a significant pecuniary interest in the outcome of the forfeiture proceeding. The administrative burden of notice to the petitioner was minimal.

This case marks the sanction by the Supreme Court of Louisiana of a procedure violative of the fundamental requirements of due process as enunciated by this Court. The violation of petitioner's due process rights under the Fourteenth Amendment to the United States Constitution merits the exercise of this Court's sound discretion concerning the grant of certiorari herein.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. NO. 96-C - 1045

JAIME L. GONZALEZ

IN RE: Ranger Insurance Co.; - Other(s); Applying for Writ of Certiorari and/or Review; Parish of Calcasieu 14th Judicial District Court Div. "G" Number 95-1046; to the Court of Appeal, Third Circuit, Number CA95-1063

May 31, 1996

Denied.

CDK
PFC
WFM
HTL
BJJ
JPV
EJB

WATSON, J. not on panel.

Supreme Court of Louisiana
May 31, 1996

/s/ John Tarlton Olivier

Clerk of Court
For the Court

APPENDIX B

NUMBER 95-1063

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA
Plaintiff-Appellee

NOT FOR PUBLICATION

VERSUS

JAIME L. GONZALEZ
Defendant-Appellant

MAR 27 1996

On Appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana; the Honorable Charley Quienalty, District Judge, Presiding.

BEFORE: COOKS, PETERS and GREMILLION, JUDGES.

COOKS, Judge.

Ranger Insurance Company, surety of the defendant, Jaime Gonzalez, appeals the trial court's denial of its petition to nullify a judgment of bond forfeiture rendered after Gonzalez failed to appear for arraignment. We affirm.

FACTS AND PROCEDURAL HISTORY

Jaime L. Gonzalez was arrested on September 18, 1991,

for possession of cocaine over 400 grams. On September 28, 1991, Gonzalez executed a contract with a surety, Ranger Insurance Company, to post a bail bond in the amount of $200,000.00 to secure his release from the States custody.The State transferred the records involving Gonzalez's criminal activity for further investigation and prosecution by federal authorities. A federal Grand Jury eventually returned an indictment charging Gonzalez with a violation of 21 U.S.C. §841(a)(1) and 841(b)(1)(A). However, the Grand Jury subsequently returned a Superseding Indictment which, in effect, dismissed the previous indictment and returned the case to the State for prosecution.

La.Code Crim.P. art. 701(B)requires where a defendant is not continued in custody after arrest, an indictment or information shall be filed within 150 days of the arrest if the defendant is booked with a felony. Defendant was not indicted by a State grand jury until June 2, 1994, approximately 975 days after arrest. Defendant and his surety, were served with notice; and, defendant was directed to appear in court on August 29, 1994, for arraignment. Defendant did not appear at the scheduled arraignment. On September 7, 1994, the court ordered a bench warrant and a bond forfeiture. The judgment forfeiting bond was signed the next day.

Receiving notice of the forfeiture Ranger filed a Petition for Nullity of Judgment of Bond Forfeiture, and Motion for Discharge and Release of Surety. After a hearing the court denied Ranger's motion and this appeal followed.

ANALYSIS

Ranger argues the trial court erred in dismissing its

Petition for Nullity of Judgment of Bond Forfeiture without allowing it to present evidence at a contradictory hearing as provided for in La.Code Crim.P. art. 701(B) which states:

> "Failure to institute prosecution as provided in Subparagraph (2) shall result in the release of the bail obligation if, after contradictory hearing with the district attorney, just cause for the delay is not shown."

The State acknowledges Ranger had grounds for an Article 701 contradictory hearing provided if requested such hearing before forfeiture of the bond. Once the forfeiture occurred, the State contends, Ranger was precluded from requesting a contradictory show cause hearing as provided by Article 701.

We agree with the State's argument. Ranger could have provoked a contradictory hearing at any time between the lapse of 150 days after arrest and the defendant's failure to appear. At such hearing, the State would have been required to show good cause why a bill had not been filed. If it could not do so, the trial court was mandated to release Ranger from its bail obligation. However, Ranger did not timely request a hearing. Defendant breached the bail obligation by failing to appear at the scheduled arraignment. Ranger's attempt to invoke the "show cause" provision of Article 701 as grounds for nullity of its obligation to honor the bond is not authorized by statute and comes too late.

Ranger also argues the forfeiture procedures utilized by the State did not meet the minimum due process requirements of Article I, Section 2 of the Louisiana Constitu-

tion of 1974 and the 14th Amendment to the United States Constitution. Specifically, Ranger asserts since the state did not forfeit the bond on the same date defendant failed to appear, due process required that Ranger receive notice of the next, scheduled arraignment date before issuance of an order forfeiting the bond.

In *State v. Bercy,* 628 So.2d 1323 (La.App. 3 Cir. 1993), *writ denied,* 94-0064(La.3/11/94) 634 So.2d 397 and *State v. Cole,* 618 So.2d 4 (La.App. 3 Cir. 1993), this court held defendant's appearance is not required at a bond forfeiture hearing. This court reasoned in *Cole* as follows:

> "Defendant's appearance is not required at a bond forfeiture hearing. Rather, LSA-R.S. 15:85 governs bond forfeiture hearings. Particularly, LSA-R.S. 15:85(A)(1)(a) states that if a defendant fails to appear and answer, after being properly noticed, the trial court, after hearing proper evidence, shall enter judgment, decreeing the forfeiture of the bond. Accordingly, we find that the State was not required to send supplementary notice to the defendant or his surety or the surety's agent of the May 23, 1991, bond forfeiture hearing."
> *Id* at 5.

We concluded in both *Bercy* and *Cole* that the surety was not prejudiced when the state chose to delay the bond forfeiture hearing for several days. The same is true in this case.

DECREE

For the above reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Ranger Insurance Company.

AFFIRMED.

This opinion is not designated for publication. Rules 2-16.2 and 2-16.3, Uniform Rules, Courts of Appeal.